

LIBRARY

U. S. DISTRICT COURT, S. D.

Revised Copy

U. S. District Court, S. D.
FILED
NOV 15 1935
U. S. DISTRICT COURT

IN THE
SUPREME COURT OF THE UNITED STATES

DECEMBER TERM, 1935

No. 12

UNITED HOSE WORKERS OF AMERICA,
Petitioners.

JOHN R. PENNINGTON, SYDNEY E. PHILLIPS and
ALLAN GORD PHILLIPS, Advers. of the Estate of
Samuel Phillips, Deceased,
Respondents.

On Writ of Certiorari to the United States Court of Appeals
for the Sixth Circuit.

BRIEF

Of Respondents in Reply to Comments Concerning
This Case Made by the United States as Amicus
Curiae in a Brief Filed in Case No. 220, Local Union
No. 120, Etc., vs. Sewal Tea Company, Inc.

JOHN A. ROWNTREE,
1412 Hamilton Bank Building,
Knoxville, Tennessee,
Attorney for Respondents.

St. Louis Law Printing Co., Inc., 415 N. Fifth Street. Circular 1-4671.



TABLE OF CASES.

	Page
Allen Bradley Company v. Local Union No. 3, 325 U. S. 797	2, 5, 6, 7, 8
Apex Hosiery Company v. Leader, 310 U. S. 469	6
Continental Ore Co. v. Union Carbide Co., 370 U. S. 690	13
Georgia v. Pennsylvania Railroad Company, 324 U. S. 439	9
Hylton Harmon, Trustee of the Coffeyville Loan and Investment Co., Inc. v. The Valley National Bank of Arizona et al. (C. A. 9th, Dec. 17, 1964), ... F. (2) ..., CCH Trade Cases 71,327	12
Jewel Tea Company Case, No. 240	3, 9
Pfotzer v. Aqua Systems (C. A. 2d, 1947), 162 Fed. 2d 779	12
United Brotherhood of Carpenters and Joiners of America v. United States, 330 U. S. 395	8
United Brotherhood of Carpenters v. United States, 330 U. S. 395	6
United States v. Hutcheson, 312 U. S. 219	6
United States v. Socony-Vacuum Oil Company, 310 U. S. 150	8
United States v. Women's Sportswear Association, 336 U. S. 460, 463-464	9



IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1964.

No. 48.

UNITED MINE WORKERS OF AMERICA,
Petitioner,

vs.

JAMES M. PENNINGTON, RAYMOND E. PHILLIPS and
LILLIAN GOAD PHILLIPS, Admr. of the Estate of
Burse Phillips, Deceased,
Respondents.

On Writ of Certiorari to the United States Court of Appeals
for the Sixth Circuit.

BRIEF

**Of Respondents in Reply to Comments Concerning
This Case Made by the United States as Amicus
Curiae in a Brief Filed in Case No. 240, Local Union
No. 189, Etc., vs. Jewel Tea Company, Inc.**

We read Press reports in December, 1964, that the United States as Amicus Curiae had filed a brief in Case No. 240, Local Union No. 189, Etc., v. Jewel Tea Company, Inc., and that this brief recommended reversal of this case, No. 48, as well as No. 240.

Not having been served with copy of the Government brief, we called the Department of Justice and in response to that call have been furnished a copy of that brief. We are making reply to comments concerning the case at bar, No. 48, in the Government brief, as soon as possible after receiving copy thereof.

We observe that the Government brief at page 26, without explanation, classifies the case at bar as one involving solely the question of the validity of a wage clause in a collective bargaining agreement. On that page it is also indicated, without explanation, that *Allen Bradley Company v. Local Union No. 3*, 325 U. S. 797, is in a category that is not applicable to the case at bar. Then the brief states at page 33:

"Thus, in the pending Pennington case we would conclude that the judgment should be reversed if the evidence shows no more than that the United Mine Workers and the employer parties to the wage and royalty agreements knew, or even desired, that the consequence of the increased compensation would be to put some employers out of business, provided that the union was acting bona fide in the belief that increased compensation would benefit its members."

The brief goes on to specify two qualifications to the above observation:

"First, a union which owns and operates a business has no more right to use anticompetitive leverage to injure its business competitors than does any other business entity."

"Second, both the union and employers are guilty of a violation of Section 1 of the Sherman Act where the proof shows an independent conspiracy of businessmen, even though it grew out of labor dispute, or was implemented through a collective bargaining agree-

ment, or the collective bargaining negotiations were the occasion for its origination. Allen Bradley, *supra*, and United States v. Women's Sportswear Mfgs. Assn., 336 U. S. 460, are such cases."

It seems on the surface that the Government has considered a part of the theory of conspiracy involved in this case, dismembered that part of the theory, made a recommendation with respect to reversal, and then added some saving clauses on the chance that there might be something more to the case.

Before the granting of the writ in the **Jewel Tea Company** case, No. 240, the Government filed a brief stating at page 5:

"We have not filed a brief *amicus curiae* in United Mine Workers case because it involves a number of peculiar facts and also because the antitrust issues appear to turn chiefly upon the detailed analysis of a voluminous record."

It is not directly stated whether or not Government Counsel had made the detailed analysis of the record and considered fully the "peculiar facts", or even read the briefs, in this case when it filed its last brief in No. 240. We cannot believe that the Government, in a brief not served upon Counsel in this case, intended to pass judgment upon either the theory upon which the case was tried, or the jury verdict based upon the record.

The brief of the United States does not directly consider any but a small part of the theory of conspiracy advanced by us in this case. Apparently, the Government was primarily concerned with the validity, *per se*, of certain types of clauses in multi-employer collective bargaining agreements, rather than conspiracies behind such agreements. And the brief was filed in a case (No. 240) where the Trial Court found that the evidence established that the collective bargaining agreement with reference to hours

of work "was fashioned exclusively by the unions to serve their own interests."

It will be recalled that the case at bar was founded on a conspiracy participated in by the union with business groups to stabilize production and prices and to monopolize markets for major coal companies who were favored by fixed conditions of geology and terrain, and the case involved the efforts of the conspirators to take over the important new TVA coal market. The case involved the investment by the union in, and loans to, major coal companies, with expectations of profit, and these companies supported by union financing have engaged in predatory pricing on plaintiffs' market, damaging the plaintiff, at a time when the union and the major coal companies were trying to drive the local small companies out of that market. The gist of the conspiracy is found in that part of the statement of "theory of conspiracy" set forth in our main brief which states:

"The union in carrying on the foregoing activities pursuant to its understanding and agreement with the major coal companies was not acting alone to further its own interests as an organization of wage earners but was aiding, abetting and cooperating with businessmen in an effort to restrain trade of small coal companies and to monopolize the industry for the major coal companies; the conspiracy involved boycotts and a purpose to stabilize the prices of coal in the industry; the practices used pursuant to the conspiracy, particularly the imposition of the constantly increasing terms of the National Bituminous Coal Wage Agreement upon the small coal companies, such as that of Phillips Brothers, and the price-cutting practices of the conspirators on the markets supplied by Phillips Brothers were unreasonable."

The jury found the conspiracy existed and this verdict has been sustained by the two lower courts.

Thus, our whole case falls outside of the area of prime concern to the Government—the validity, per se, of the terms of a collective bargaining agreement. Rather, our case falls entirely within the qualifications stated by the Government to its principal observations, which qualifications were rather lightly treated in the Government brief.

Two aspects of the Government brief are difficult for us to understand. One of these is the tendency to relegate the **Allen Bradley** rule to a place of insignificance in a Sherman Act case against the union. The other aspect concerns the ideas expressed about the kind of proof that is appropriate in this kind of case.

The brief seems to be completely absorbed with the concept that such cases as this should be judged solely from the nature of provisions in a collective bargaining agreement. We are not sure we understand the analysis made by the Government of particular kinds of clauses in collective bargaining agreements, wherein the Government considers whether such clauses give direct or indirect benefit to members, or impose direct or indirect restraints upon commerce.

Generally, a collective bargaining agreement is not simply a wage clause or an hour's clause, but it contains these clauses together with a lot of others, including union shop clauses and, in some cases, boycott provisions and protective wage clauses, etc., and the overall effect of the agreement cannot be judged without looking to the whole agreement. Furthermore, it cannot be judged without looking to the circumstances in the industry covered by the agreement.

We had assumed that no union would violate the anti-trust law, regardless of what its agreements provided, if it were operating for the benefit of its members exclusively and was not acting pursuant to a combination, understanding or conspiracy with business groups to aid

such groups in restraining trade or monopolizing in the markets for goods.

On the other hand, it has been our position that if such a combination, understanding or conspiracy is charged, any kind of provision in an agreement that can be shown to further that conspiracy may be proper evidence of the existence of that conspiracy, when taken in connection with other proof on the background, circumstances and relationships in the industry. We cannot read the decisions in **Apex Hosiery Company v. Leader**, 310 U. S. 469; **United States v. Hutcheson**, 312 U. S. 219; **Allen Bradley Co. v. Local Union No. 3**, *supra*; and **United Brotherhood of Carpenters v. United States**, 330 U. S. 395, to mean anything else. We do not believe these decisions leave all of the uncertainties in the law which the Government indicates exists.

Perhaps the intricate problems the Government visualizes result from the Government's reluctance to confine union liability under the antitrust law to the **Allen Bradley** rule and from a purpose to save some area of the law for an anticipated situation, not presently defined or identified, where a union should be liable under the antitrust law for a particular kind of bargaining agreement without proof of any other understanding with business groups. Or, perhaps, the Government Counsel outside of the Anti-Trust Division share the antipathy to Sherman Act conspiracy cases against unions expressed by the unions who have filed briefs in this case. However, we do not believe that any better rule could be devised than that found in the **Allen Bradley** case.

The Sherman Act conspiracy case has to be a sort of blunt instrument to be wielded to preserve economic freedom, and the ultimate decision must be by a trial court or jury on whether the charged combination or conspiracy existed, based upon all of the proof and inferences from

that proof, and this decision should stand on appeal, if the verdict comes after appropriate instructions and if it is reasonable on the record.

When a union uses its economic power and bargaining status in such a way that it can readily show it was acting for the interests of at least a majority of its members and can also show that it was not favoring a group of employers over a large competing segment of the industry on whom the union was imposing impossible conditions, it has not had to fear the Sherman Act in the twenty years since **Allen Bradley**. But, if the union finds it difficult to show these things, we submit that it should stand in fear of the Sherman Act and the rule in **Allen Bradley**. That rule preserves the purposes envisioned in the Clayton and Norris-LaGuardia exemptions, yet it has proved effective to accomplish the purposes of the Sherman Act.

We find some confusion in the Government brief with respect to the evidentiary rules in this kind of case. We refer to the language employed with respect to consideration by a Court or jury of the provisions in a collective bargaining agreement in a Sherman Act case against the union. We are not sure as to the position of the Government on this because at page 34 of the brief it is parenthetically acknowledged that a union violates the Sherman Act by engaging in a conspiracy with business men "even though it grew out of a labor dispute, or was implemented through a collective bargaining agreement, or the collective bargaining negotiations were the occasion for its origination." In such situations it would be anomalous, indeed, to say that any proof about the collective bargaining agreement or negotiations would be "immaterial" or otherwise incompetent.

The language used at page 36 of the Government brief is the kind of comment to which we take exception. Even here it is not clear whether the contention is that proof about collective bargaining agreements or negotiations is

simply insufficient by itself or whether it is incompetent and to be excluded. In some parts of this long paragraph it is said that such proof "is not enough," but in other parts it is said that such proof is "immaterial," and it is indicated that such proof should be excluded in a conspiracy case since the jury should not be allowed to speculate about why a union bargains a certain way or to consider such evidence in reaching a verdict.

The brief also takes the position at pages 32-33 that it is immaterial that a union intends that its demands drive out of the industry employers who cannot meet those demands in order that the living standards of its members employed by the surviving companies may be raised. This latter concept is surely contrary to the successful contentions of the Government in such a case as **United Brotherhood of Carpenters and Joiners of America v. United States**, 330 U. S. 395 (which case was not mentioned in the Government brief; and see the Government's contention in that case at 144 Fed. 2d 549), to say nothing of the holding in **Allen Bradley Company v. Local Union No. 3**, 325 U. S. 797.

Page 33 of the Government Brief indicates that it is not material whether a union desires stabilization of the industry, but it is not clear whether the Government is contending that the union should be allowed to promote stabilization of prices and production in an industry by combining with business groups in that industry. Such a purpose is clearly one of the fundamental targets of the antitrust law. **United States v. Socony-Vacuum Oil Company**, 310 U. S. 150.

In our case we take the basic premise that a union violates the Sherman Act by conspiring with business groups to aid such groups to restrain trade and to monopolize in the markets for goods. It is foreign to antitrust law that there be technical restrictions and boundaries in the proof bearing upon the relationships and purposes between the

alleged conspirators. No rule could have effective or fair results except that which permits the development of the whole picture of the conduct, relationships and understandings. The intent and effect of any agreement between a union and business groups in a Sherman Act case must be judged "in the light of its origin and the circumstances of the industry." **United States v. Women's Sportswear Association**, 336 U. S. 460, 463-464. Indeed, in the **Jewel Tea Company case, No. 240**, the trial court considered it necessary to go into the origin and background of the agreement on hours as well as its effect on the union members and on the trade before reaching its conclusion from "the purport, history and effect of the controverted provision;" that it "was fashioned exclusively by the unions to serve their own interests." And the Government carefully pointed out these considerations by the Trial Court in the statement of the facts in its brief.

Perhaps the difficulties we have with the Government's brief is the starting point. Rather than starting from a contention of invalidity, per se, of a bargaining agreement clause under the antitrust law (the Government's initial point of focus) we start from a contention that there was a behind the scenes illicit combination and understanding between the union and major coal combines as to the commercial or economic future of the industry, the nature of the understanding being evidenced and promoted, in part, by the successive coal wage agreements. The concept of an illicit combination or understanding back behind otherwise legal contracts or arrangements between alleged conspirators is, of course, not novel in Sherman Act cases. And, this is true with respect to combinations to accomplish illegal restraints by means of contracts or activities that are fully regulated by duly constituted federal regulatory agencies.

The example that seems apt is that found in **Georgia v. Pennsylvania Railroad Company**, 324 U. S. 439. In that

case the defendant railroads contended that Georgia's suit under the Sherman Act impinged upon the fully regulated area of rail rates wherein the doctrine of primary jurisdiction had originated and held full sway. But this Court said:

"(Georgia) merely asks that the alleged rate fixing combination and conspiracy among the defendant carriers be enjoined. As we shall see that is a matter over which the Commission has no jurisdiction."

Of course, we emphatically disagree with the impression, apparently held by the Government, that this case only involves the question of the validity of a wage clause in a union contract. We refer to our statement of facts in the Appendix to our main brief and we do not think it appropriate to go through all of the statement of the case again. We wish to emphasize certain parts in view of the comments made by the Government.

In the preliminary stages of this case the developing facts spoke loudly of union purposes and understandings that are not normally found in a collective bargaining agreement. The facts open with the union concentrating on the commercial or economic side of the industry, throwing its tremendous power into an effort directed at production and price control; preceded by blasts at the operators for not initiating these efforts, and warnings that it was going to take this course itself as "the only stabilizing force in the industry." When the struggles of the union with major companies ended in 1950, there are multiple facts indicating the union's concentration on the commercial side of the industry has not subsided, but rather is redoubled in combination with major coal companies cooperative with union policies which were slanted to a fantastic extent toward elimination of jobs for members and elimination of production from whole areas in the industry. These areas could not possibly fit methods of operation into the scheme set by the union and the major

combines—not because they were “marginal” competitors without normal ability or initiative and not because they were “sweated labor” employers, but because geology and terrain created physical barriers which constituted obvious and well known exterminators of their production which was competitive to that of major companies. At the end the union sits with the major companies as owner and investor, expecting its economic ventures in the coal industry in the long run to be “immensely profitable” (493a). The union was conscious of the intrinsic value of the enormous coal lands held by these companies (1126a)—a billion tons of reserve coals strategically located in the thick western Kentucky seams which were suited for the type production with intensive mechanization which was the only way that the union and the major companies would allow coal to be mined in the straight jacket that they had devised.

The union-owned companies were allowed to share in supplying large contracts obtained by other major companies. In the meantime, in the midst of a campaign of the union and certain major companies to drive the small Tennessee operators out of the TVA market, the union-owned companies, financed with union pledges, were used as “fighting ships” to dump coal on that market at depressing prices. The only important market the plaintiffs had was wrecked and this is how plaintiffs were damaged.

As the Government brief indicates, some part of this conspiracy relates to forcing upon the coal industry wage increases in rapid succession “tailored to fit” the progressively increasing mechanization techniques of the major coal combines, with knowledge of the effect on the thin-seam areas. Parallel to this phase of the case is that wherein the union and major companies sought to force the same wage scale under the Walsh-Healey Act upon the

thin-seamed local mines in the TVA market where the policing of the contract was difficult. But these phases are only part of the whole picture.

When phases of the proof in a case charging a broad conspiracy furnish evidence of the purposes and intents of the alleged conspirators, it appears reasonable and proper to allow admission of such proof. Thus in **Hylton Harmon, Trustee of the Coffeyville Loan and Investment Co., Inc. v. The Valley National Bank of Arizona et al.** (C. A. 9th, Dec. 17, 1964), ... F. (2) ..., CCH Trade Cases 71,327, it was said:

“Nonetheless, **Noerr** does not necessarily bar relief under the present complaint. The complaint can be read as alleging that appellee's joint effort to influence the Attorney General was but one element in a larger, long-continued scheme to restrain and monopolize ‘commercial banking in particular and the financial industry in general within the State of Arizona.’ ”

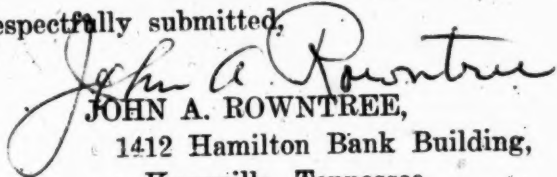
And this distribution from the **Noerr** rule seems particularly applicable where a government market for goods is involved. In **Pfotzer v. Aqua Systems** (C. A. 2d, 1947), 162 Fed. 2d 779, the plaintiff contracted to install a gasoline aqua distribution system at the Naval Air Station at Pensacola, Florida. The defendant, having a patent upon a particular kind of hydraulic distribution system, sought to force the plaintiff to purchase the defendant's system to install on this job, and it also sought to influence the Naval authorities to keep out any other hydraulic gasoline distribution system besides the one upon which the defendant had a patent. The Trial Court excluded communications between the defendant and Naval authorities which tended to show the effort of the defendant to influence the Naval authorities in this respect. Judge Learned Hand said, at page 785:

“The correspondence between Kaestner and Wrightson (the Naval purchasing authority), coupled with the Sullivan report, were rationally relevant to the question whether Kaestner and the Aqua Company were trying to influence the naval authorities to keep out any other hydraulic gasoline distribution system. It was not necessary to prove that there was any corrupt bargain between them; it was enough, if the correspondence threw light upon the efforts of the Aqua Company, and served to prove they had acquired control, and meant to keep it. That made the correspondence admissible on the issue of monopoly.”

This proposition is supported by **Continental Ore Co. v. Union Carbide Co.**, 370 U. S. 690:

We apologize for tendering yet another brief, but we felt the Court might not understand our position on these matters, since the Government evidently did not.

Respectfully submitted,


JOHN A. ROWNTREE,

1412 Hamilton Bank Building,
Knoxville, Tennessee,

Attorney for Respondents.